ALLEGED SHIPMENT: On or about June 30, 1948, by Reid Murdoch, from Chicago, Ill.

PRODUCT: 99 cases, each containing 24 8-ounce jars, of peanut butter at Houston, Tex.

LABEL, IN PART: "Monarch Peanut Butter."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of insect fragments; and, Section 402 (a) (4), it had been prepared under insanitary conditions whereby it may have become contaminated with filth.

DISPOSITION: November 1, 1948. Default decree of condemnation. The product was ordered delivered to public institutions, for use as stock feed.

13862. Adulteration and misbranding of peanut butter. U. S. v. 20 Cases * * *. (F. D. C. No. 24037. Sample No. 26145–K.)

LIBEL FILED: On or about January 7, 1948, Western District of Missouri.

ALLEGED SHIPMENT: On or about October 30, 1947, by the Southwestern Nut & Oil Co., from Sand Springs, Okla.

PRODUCT: 20 cases, each containing 12 28-ounce jars, of peanut butter at Springfield, Mo.

LABEL, IN PART: "Cimarron Homogenized Peanut Butter 28 Oz. Net Wt."

NATURE OF CHARGE: Adulteration, Section 402 (a) (3), the product consisted in whole or in part of a filthy substance by reason of the presence of insects, insect parts, and fragments.

Misbranding, Section 403 (e) (2), the product failed to bear a label containing an accurate statement of the quantity of the contents. (The jars contained less than the labeled 28 ounces net weight.)

DISPOSITION: April 5, 1948. Default decree of destruction.

OILS AND FATS

13863. Adulteration and alleged misbranding of Pop'n Oil. U. S. v. 36 Drums * * *. Tried to the court. Judgment for claimant; Judgment reversed on appeal. Decree of condemnation. (F. D. C. No. 10813. Sample No. 28049–F.)

LIBEL FILED: On or about September 27, 1943, Northern District of Georgia.

ALLEGED SHIPMENT: On or about July 3, 1943, by the J. V. Blevins Co., from Nashville, Tenn.

PRODUCT: 36 400-pound drums of Pop'n Oil at Atlanta, Ga. Examination showed that the product consisted of mineral oil, artificially flavored, with an imitation butter flavor and artificially colored yellow.

LABEL, IN PART: (Stencil on drums) "Pop N Oil Contains Liquid Petrolatum Plastic Butter Flavor Artificial Flavor & Color For Mfg. & Redist. Use Only"; (stick label on drums) "Pop N Oil Liquid Petrolatum, Plastic Butter Flavor (containing butter, esters, lecithin, casein, alcohol, starch) Artificial Flavoring Color Added For Mfg. and Redistribution Use Only."

NATURE OF CHARGE: Adulteration, Section 402 (b) (2), mineral oil having no food value had been substituted for the universally recognized components of popcorn dressing or oil, i. e., butter or an edible vegetable oil; Section 402 (b) (3), inferiority had been concealed by the addition of artificial color and flavor; and, Section 402 (b) (4), artificial color and flavor had been added to

the article or mixed or packed with it so as to make it appear better or of greater value than it was, since the artificial butter flavor and color suggested an oil or dressing made from butter.

Misbranding, Section 403 (a), the article was offered for sale under the name of "Oil," the name of another food consisting of melted butter or vegetable oil designed for use as a dressing on popped popcorn.

DISPOSITION: The Wil-Kin Theater Supply, Inc., Atlanta, Ga., claimant, having filed an answer denying that the product was adulterated and misbranded, the case came on for hearing before the court. On October 22, 1946, the court handed down findings of fact and conclusions of law for the claimant and ordered the libel dismissed. The judgment of the district court was appealed to the Circuit Court of Appeals for the Fifth Circuit, which, on November 14, 1947, handed down the following opinion reversing the district court and remanding the case, with directions to enter a decree of condemnation against the product:

HOLMES, *Circuit Judge*: "Pursuant to a libel filed by the United States, thirty-six drums of mineral oil, under the trade name of Pop'n-Oil, were seized and held in the custody of the Marshal, pending further orders of the court below respecting the same. The libel of information alleged that said oil was adulterated within the meaning of Section 342 (b) (2), (b) (3), and (b) (4), Title 21, of the United States Code, and that it was also misbranded within the meaning of Section 343 (b) of said code. After a trial upon the merits, the court vacated the seizure, ordered possession of the oil restored to the claimant, and dismissed the libel.

"The court below held that the article seized was not harmful, that the drums were not misbranded, and that, in the absence of any definition or standard of identity prescribed by the Administrator, the true labeling of the article was a compliance with the Act.

"The drums contained 99.3% mineral oil, artificial color and flavoring constituting the other seven-tenths of one per cent. This product was sold, shipped, and intended to be used as food. When popcorn is popped with Pop'n-Oil, the corn absorbs a substantial amount of the oil, so that 100 ounces of prepared popcorn would have in it from six to seven ounces of Pop'n-Oil. From a scientific standpoint, this was a very considerable amount, it being generally recognized that mineral oil has no food value. According to one dealer, who was a witness, the popcorn sold by him contained about 12½% of mineral oil. As to the harmful effects from the use of mineral oil as a food, the expert testimony (developed by questions from the court) is positive and uncontradicted.[1] The product under seizure is a rich yellowish color, and

[1] "Q. All right, with respect to the question that was put to you about the use of mineral oil as a making of salad dressing, and so forth, can you state whether or not the medical authorities approve the use of mineral oil in salads or anything else, any other—

"A. There is a report in the Journal of the American Medical Association for 1942, by the council on food and nutrition, council of the American Medical Association, in which they give an adverse report on the use of mineral oil in food, mineral oil—I mean salad oils: mayonnaise, and so forth.

"By the Court:

"Q. For what reasons? Do they say why it is?

"A. The reason they give is that mineral oil in the gastro-intestinal tract, in the alimentary tract, absorbs a very large quantity of carotin. Carotin is the chemical substance which the body uses to synthesize vitamin A, which is an essential vitamin. It also interferes to a lesser extent with the absorption of vitamin A itself. It interferes also with the absorption of vitamin D, which is an essential vitamin. It interferes with the absorption of calcium and phosphates which are necessary for bone building, and also it has been found recently in experimental work that it interferes with the absorption of vitamin K, from the gastro-intestinal tract. Vitamin K is important and necessary for normal clotting of blood.

"Q. Do you know whether or not it is the general practice of doctors to prescribe the use of mineral oil in salads where they desire to reduce a person's weight?

"A. It has been done.

"Q. Isn't that rather a general practice?

"A. I think it is quite general. I am not a practicing physician, however, and my opinion would be of a layman.

"Q. Was it in your opinion as a layman or a professional man that you have been discussing about the effect of mineral oil in the system?

"A. That is professional.

"Q. Beg pardon?

resembles the color of melted butter. The types of oil ordinarily used in the popping of corn are cocoanut, cotton-seed, and soybean, but during the war there was a shortage of these oils, and some distributors sold mineral oil for that purpose. Until the shortage of vegetable oils brought on by the war, mineral oil had never been used for popping corn. Mineral oil has no food value whatever, and therefore does not add to the food value of popcorn. A quantity of 6 or 7 per cent of any ingredient added to a food is a considerable rather than an infinitesimal amount. At the close of the Government's case, the claimant rested without adducing any evidence.

"Although the Government has abandoned its charge of misbranding, it has not abandoned any of its charges of adulteration but has concentrated its argument in this court on the following specific questions:

"1. Whether the court erred in concluding that, in the absence of a definition and standard of identity promulgated under 21 U. S. C. 341, the truthful labeling of the article was a compliance with the Act.

"2. Whether the court erred in concluding that the truthful labeling of the article exempted it from the provisions of 21 U. S. C. 342 (b) (3) and (4).

"3. Whether the court erred in failing to find from the uncontroverted evidence that the article was adulterated within the meaning of 21 U. S. C. 342 (b) (3) and (4) when introduced into or while in interstate commerce.

"The relevant statutory provisions are Sections 304 (a), 401, 402 (b) (3), and 402 (b) (4) of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. 334 (a), 341, 342 (b) (3), and 342 (b) (4)).

"We think the adulteration of the product was not cured by its truthful labeling. Adulteration should not be confused with misbranding. The ultimate consumer of the popcorn probably never sees the labeling. The cartons containing the popcorn, sold in theatre vending machines, do not contain any statement showing that the popcorn dressing consists of 99.3% mineral oil, artificially colored and flavored. We think the Government's evidence sustained its allegations of adulteration under 21 U. S. C. 342 (b) (3) and (4).

"Even in the absence of a reasonable definition and standard of identity, promulgated under 21 U. S. C. 341, truthful labeling does not exempt an article from the provisions of 21 U. S. C. 342 (b) (3) and (4), which provide that a food shall be deemed adulterated if damage or inferiority has been concealed in any manner, and also that a food shall be deemed adulterated if any substance has been added thereto or mixed or packed therewith so as to make it appear better or of greater value than it is.

"In the instant case, mineral oil has been artificially colored and flavored to make it look like butter or vegetable oil. That mineral oil is inferior to melted butter on popcorn is plain. The same is true of cocoanut, soybean, or cotton-seed oil. To conclude that a food for which a standard of identity has not been promulgated is exempt from the economic adulteration provisions of the Act would result in rendering inoperative all of 21 U. S. C. 342 (b). The Administrator is not required to promulgate definitions and standards of identity for foods under any and all conditions. Administrative selectivity in such standardization is a part of his discretion and responsibility. To permit a class of foods not so selected to escape other applicable provisions of the law would create a loophole which the Act sought to avoid.

"The evidence compels the conclusion that the oil sought to be condemned was artificially prepared to appear to be an acceptable popcorn dressing made from vegetable oil having a substantial food value, or from butter. It is a mat-

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"A. That is an opinion as a specialist.

"Q. You consider yourself qualified to give those views and not qualified to give the latter?

"A. I would say that as most individuals become cognizant or aware of things that physicians do, and that is one of them. I know that.

"Q. Why did you testify in one instance as a layman and in another instance as a specialist, that is the only thing I am asking?

"A. I was answering your question, Your Honor, to the effect that I do happen to know from reading and contact, that that is done. Now it is possible that if I had not been interested or were not interested in medical problems in general, I might not notice those things. But I do happen to know that that has been done and is being done."

By the Court:

"Any other questions?"

By Mr. Lockerman:

"Q. Your special field is pharmacology?

"A. My special field is pharmacology.

"Q. Yes, sir. You may come down."

ter of common knowledge, of which the court may take judicial notice, that for use as food melted butter is superior to mineral oil.

"The decree appealed from is reversed, and the cause remanded to the district court with directions to enter a decree of condemnation against the articles seized. REVERSED."

SIBLEY, *Circuit Judge, dissenting:* "Zeal for enforcement, I think, is here outrunning common sense and the true intent of the law. The seizure was made in 1943, in the midst of the late war. Theretofore the dressing for popped corn had been some animal or vegetable oil, such as melted butter, cocoanut oil, soybean oil, cottonseed oil, or Wesson oil. Because of war conditions, cocoanut oil could not be had at all, butter and cottonseed oil, soybean and Wesson oil, which had food value, became scarce and practically unobtainable because of the war demand for foodstuffs. Something else had to be substituted in the popcorn business, carried on at movie theaters and similar places of amusement, where popcorn is eaten in idleness and not for nutriment. Mineral oil, which had long been used in salad dressings in place of olive oil and the like, and is still so used, came into general use for the popcorn dressing. It was colored light yellow, (which is the natural color of most oils and greases unless refined out), and was flavored to give the popcorn some taste. No point whatever is here made against adding the flavor. There is only the charge that a color was added which made it look more like melted butter. There is no evidence as to the color of cocoanut oil, cottonseed oil, soybean or Wesson oil which also it was substituting. There is no evidence that the intent was to make it look like butter, or that any eater of popcorn thought it was butter, or cared. There was no effort at deceit while in interstate commerce, with which alone the federal Act is concerned. The seized drums were frankly labeled; 'Pop N Oil, made from Liquid Petrolatum, Plastic Butter Flavor, Artificial Flavoring. Color Added. Distributed by Wilkin Theater Supply, Inc.' The charge of misbranding is expressly abandoned, as it must be. Only adulteration is claimed. As to that it was on the trial expressly stated by government counsel: 'If your honor please, we don't make any charge in this proceeding that the product is injurious to health or deleterious.' It is true the court pressed questions as to that upon a witness as quoted in Note 1 of the opinion, but on the entire evidence he found that 'the mineral oil was neutral and not harmful.' The evidence is specific that in a nickel package of popcorn, which weighs one ounce, there would be only one-sixteenth of an ounce of dressing, say a half-teaspoonful. That is, by common experience with mineral oil, negligible. The law intends to keep deceitful or injurious mixtures out of interstate commerce, but it does not aim to exclude all mixtures. Where petrolatum is sold as such, frankly stated to be artificially colored and flavored, and is perfectly harmless for the use intended, which is really more for entertainment than for feeding, it seems hypercritical to me at a time when war had forced all manner of substitutions in food, to condemn these drums of fifty gallons each as forfeited by law because of adulteration."

HUTCHESON, *Circuit Judge, Specifically Concurring:* "I agree with my brother Sibley that in this case, 'Zeal for enforcement, I think, is here outrunning common sense and the true intent of the law'. I agree with my brother Sibley, too, that the case does not involve any charge that the product is injurious to health or deleterious. Therefore, it is plain that the opinion adduced by the judge himself and set out in the note to the majority opinion is immaterial and irrelevant to the issues in this case. Further being merely the statement of the opinin of the witness as to a report in the Journal of the American Medical Association, it is hearsay and inadmissible and carries no weight whatever. I cannot therefore agree with the statement in the majority opinion that there is positive and uncontradicted testimony that the use of mineral oil as a food, as applied to this case, was or could be harmful.

"Notwithstanding, however, my opinion that the whole proceeding is a tempest in a teapot and that its bringing was an administrative error, I am compelled to agree with the views of my brother Holmes that, within the meaning of the statute under which the suit was brought, 324 (3) and (4), the article in question was adulterated. It was adulterated under sub. sec. (3) by having its inferiority to butter concealed by making it look like butter. It was adulterated under sub. sec. (4) by being so colored 'as to make it appear better or of greater value', that is by making it appear to be melted butter.

I, therefore, concur in the conclusion the majority opinion reaches that the cause must be reversed and remanded with directions."

On August 2, 1948, a final decree was entered in the district court, condemning the product and ordering that it be destroyed. The decree provided that destruction might be effected by delivering the product to a Federal institution, to be used for purposes other than for food.

13864. Adulteration of oil. U. S. v. 8 Cans * * * (and 1 other seizure action). (F. D. C. Nos. 24843, 24872. Sample Nos. 4513–K, 4515–K.)

LIBEL FILED: May 14 and June 4, 1948, District of Connecticut.

ALLEGED SHIPMENT: On or about October 15 and 24, 1947, by Albert M. Caputo, from Providence, R. I.

PRODUCT: Oil. 8 cans at Stonington, Conn., and 4 cases, each containing 6 cans, at Pawcatuck, Conn.

LABEL, IN PART: "Contents One Gallon Favorita Brand An Excellent Blend of Choice Corn & Peanut Oils and 20% Pure Olive Oil."

NATURE OF CHARGE: Adulteration, Section 402 (b) (2), (Stonington lot) a substance containing little or no olive oil and (Pawcatuck lot) a substance consisting of corn and cottonseed oil with not more than 5 percent of olive oil had been substituted for corn and peanut oil and 20 percent pure olive oil, which the product was represented to be.

Misbranding, Section 403 (a), the label statement "An Excellent Blend of Choice Corn and Peanut Oils and 20% Pure Olive Oil" was false and misleading. Further misbranding, Section 403 (e) (2), (Pawcatuck lot) the product failed to bear a label containing an accurate statement of the quantity of the contents. (The cans contained less than the labeled 1 gallon.) Section 403 (f), (Stonington lot) the information required by Section 403 (e) to appear on the label did not appear thereon in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use since the information did not appear on the label in the Italian language, although the label contained other representations in Italian.

DISPOSITION: August 2, 1948. Default decrees of condemnation. The product was ordered delivered to charitable institutions, conditioned that the oil be emptied into a bulk container and the original cans destroyed.

13865. Adulteration of oil. U. S. v. 6 Cans * * *. (F. D. C. No. 24871. Sample No. 4516–K.)

LIBEL FILED: June 4, 1948, District of Connecticut.

ALLEGED SHIPMENT: On or about November 4, 1947, by the Unita Packing Co., from Providence, R. I.

PRODUCT: 6 1-gallon cans of oil at Pawcatuck, Conn.

LABEL, IN PART: "White Pigeon Cream Oil Corn and Olive Oil."

NATURE OF CHARGE: Adulteration, Section 402 (b) (2), a substance consisting of cottonseed oil with not more than 5 percent olive oil had been substituted for corn and olive oil.

Misbranding, Section 403 (a), the label statement "Corn and Olive Oil" was false and misleading.

DISPOSITION: August 2, 1948. Default decree of condemnation. The product was ordered delivered to charitable institutions.